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November 4, 1996

Colleen T. Sealander, Esquire
Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4466

Dear Ms. Sealander:

The complaint filed against Zimmer For Senate, Inc. in MUR 4466 is a baseless attempt by Mr. Zimmer's opponent to generate negative media against Mr. Zimmer in the hotly contested United States Senate election in New Jersey. As the following facts and law demonstrate, the Federal Election Commission ("FEC") must dismiss this complaint and take no further action in this matter.

FACTS

Zimmer For Senate, Inc. is the principal campaign committee for Congressman Richard Zimmer, the Republican Senate candidate for the open United States Senate seat in New Jersey. Mr. Zimmer's Democratic opponent is Congressman Robert Torricelli, who filed this Complaint.

As the Complaint states, throughout the course of this campaign, the New Jersey Republican Party Committee has aired certain television advertisements. The Party has

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described them as "issue advocacy" ads that do not expressly advocate the election or defeat of either candidate, but rather address issues before the Congress that are of importance to voters in New Jersey and throughout the United States. The New Jersey Republican Party is solely responsible for the airing of these advertisements through its own media vendor. Zimmer For Senate, Inc. and the New Jersey Republicans have never jointly used the same media buyer to purchase ads, substitute ads for one another or otherwise exchanged the same air time.

One such "issue advocacy" advertisement aired under the sole authority of the New Jersey Republican Party is now the subject of this complaint. The Zimmer Committee is not listed on the ad's disclaimer and did not pay for the ad. There are no allegations to the contrary. The advertisement at issue, which ran in the Philadelphia market that extends into New Jersey, discussed the issue of Mr. Torricelli's position on taxes. Given that the level of taxation in the United States is of critical importance to voters in New Jersey and throughout the country, the advertisement urged the audience to contact Mr. Torricelli's congressional office to tell him to "stop voting for higher taxes." The advertisement never expressly advocated the election or defeat of Mr. Torricelli. Neither the United States Senate race in New Jersey nor Mr. Torricelli's status as a candidate was directly or indirectly mentioned in the advertisement. Mr. Zimmer is not mentioned in the ad.

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LEGAL ANALYSIS

**I. Zimmer for Senate Did Not Broadcast the Ad
and Should be Dismissed as Party.**

Since it is not the entity responsible for airing the television advertisement at issue, Zimmer For Senate, Inc. is not properly a party in this matter. The Complaint, without any support other than inconclusive and innocuous newspaper stories, alleges that Zimmer For Senate, Inc. has improperly coordinated with the New Jersey Republican Party so that the television advertisement somehow violates the contribution and expenditure limitations of the Federal Election Campaign Act ("Act"). Even if there was evidence (which there is not) that the Zimmer Committee had coordinated with the Party concerning an issue advocacy ad, that is not a violation of the Act.

II. An Issue Advocacy Ad Does Not Fall Under the Federal Election Campaign Act.

Pursuant to the United State Supreme Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the provisions of the Act apply to only those communications containing "express advocacy" of the election or defeat of a clearly identified candidate or candidates, not to communications merely discussing issues. The *Buckley* Court clarified that its "construction would restrict the application [of the Act] to communications containing express words of advocacy of the election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'elect,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at n. 52.

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Thus, the Court clearly distinguished between "express advocacy" covered by the Act and First Amendment-protected "issue advocacy" not covered by the Act. *Id.* at 42. In the two decades since the *Buckley* decision, the United States Supreme Court and numerous lower courts have confirmed that application of the Act is narrowly restricted to "express advocacy."¹¹ Attempts to expand beyond the bright-line "express advocacy" standard articulated by the United States Supreme Court in *Buckley* and *Massachusetts Right to Life Committee* have been struck down. *Maine Right to Life Committee*, 1996 WL 590397 (1st Cir. 1996), *aff'd* 914 F.Supp. 8 (D.Me. 1996) (invalidating 11 C.F.R. § 100.22(b)).

DISCUSSION

The complaint filed against Zimmer For Senate, Inc. in MUR 4466 must be dismissed as a baseless and partisan attempt by Mr. Zimmer's opponent to gain a political advantage in the tight race for the open U.S. Senate seat in New Jersey. The Zimmer committee did not sponsor

¹¹ See, e.g., *FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.E.d.2d 539 (1986) (the Act governs only those expenditures that "expressly advocate" the election or defeat of a clearly identified federal candidate); *Maine Right to Life Committee, Inc. v. FEC*, 1996 WL 590397 (1st Cir. 1996), *aff'd* 914 F.Supp. 8 (D.Me. 1996) (FEC regulations expanding the scope of "express advocacy" beyond strict interpretation are invalid); *FEC v. Christian Action Network*, 92 F.3d 1178, 1996 WL 431966 (4th Cir. 1996), *aff'd* 894 F.Supp. 946 (W.D.Va. 1995) (even negative advertisements regarding gay rights are protected "issue advocacy" if they do not contain explicit words or imagery advocating electoral action); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991) (pro-life voter guide is not "express advocacy" due to absence of any explicit language urging electoral action); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980) (the "words 'expressly advocating' mean exactly what they say" and do not include "implied" electoral messages); *FEC v. Survival Education Fund*, 1994 U.S. Dist. Lexis 210 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 65 F.3d 285 (2d Cir. 1995) (even communications that clearly imply an official should be defeated do not constitute "express advocacy"); *FEC v. American Federation of State, County and Municipal Employees*, 471 F.Supp. 315 (D.D.C. 1979) (Nixon-Ford poster devoid of any explicit electoral words is not "express advocacy" even though it "may have intended to influence voting").

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the ad and should be dismissed as a party. In any event, the ad in question is "issue advocacy" that does not fall under the Act, thereby requiring dismissal of the complaint as to all parties. Rather than "express advocacy" governed by the Act, the New Jersey Republican Party's advertisement concerning Mr. Torricelli's voting record on taxes represents "issue advocacy" protected by the First Amendment.

The United States Supreme Court's bright-line "express advocacy" test demands that, in order to be subject to the Act's contribution and expenditure limitations, a communication must contain "express words of advocacy" of the election or defeat of a clearly identified candidate. *Buckley*, 424 U.S. at n. 52; *Massachusetts Citizens For Life Committee*, 479 U.S. at 248-9. Without such explicit language advocating electoral action, a communication will be deemed protected "issue advocacy" even if it contains negative statements about a particular candidate, implies an electoral message, or otherwise intends to influence voting. *See Christian Action Network*, 894 F.Supp. at 953; *Central Long Island*, 616 F.2d at 53; *Survival Education Fund*, 1994 U.S. Dist. Lexis 210; *American Federation*, 471 F.Supp. at 317. The uncompromising nature of this narrow "express advocacy" test was confirmed recently by the First Circuit's decision in *Maine Right to Life* upholding the invalidation of the FEC's expanded "express advocacy" standard. *See* 1996 WL 590397.

An application of this bright-line "express advocacy" standard to the television advertisement at hand demonstrates that it is "issue advocacy" beyond the Act's scope. Not only

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did the advertisement lack any "express words of advocacy" as required under the test, but it never even mentioned the United States Senate race in New Jersey or Mr. Torricelli's status as a candidate. The advertisement simply explored the issue of Mr. Torricelli's public position on taxes and asked the viewer to contact Mr. Torricelli's office regarding the issue. The fact that this advertisement ran in the Philadelphia market neighboring New Jersey and painted Mr. Torricelli's record in a negative light does not alter the fundamental nature of the advertisement as "issue advocacy."^{2/}

In addition to its status as "issue advocacy," this ad could in no way even be construed as "express advocacy" under 11 C.F.R. § 100.22(b). The advertisement did not contain an "unmistakable, unambiguous" electoral message nor could any "reasonable mind" conclude that the advertisement encouraged the defeat of a clearly identified candidate. *See* 11 C.F.R. § 100.22(b). Indeed, the advertisement never encouraged the defeat of Mr. Torricelli nor directly or indirectly identified him as a candidate.

The bottom line is that this complaint is wholly without merit and must be dismissed promptly by the FEC.

^{2/} While the ad was the New Jersey Republican Party's, respondents would note on the ad's airing in the Philadelphia market that: (1) Mr. Torricelli's record on issues such as taxes are critically important to voters throughout the United States, and (2) the Philadelphia media market extends well into New Jersey and is therefore an effective tool to reach New Jersey residents, including those who reside in Mr. Torricelli's congressional district.

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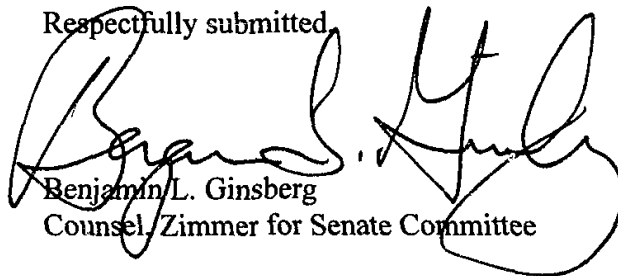
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CONCLUSION

For the above-stated reasons, Zimmer For Senate, Inc. requests that the FEC dismiss the complaint and take no further action on MUR 4466.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Benjamin L. Ginsberg", is written over the typed name and title.

Benjamin L. Ginsberg

Counsel, Zimmer for Senate Committee